IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPLICATION NO.2552 OF 2006

1. Shri Rathnakar Rai
2. Shri B.G.Krishnan ...Applicants.

V/s.

1. Shri Swaran Bhel
2. The State of Maharashtra ...Respondents.

Shri Shirish Gupte, Sr.Counsel with Subodh Desai i/b Mr.G.S.Pikale, advs. for the Applicant.

Mr.Mahesh Jethmalani, Sr.Counsel with Laxman Kanal, advs. for the Respondent No.1.

Mr.Y.S.Shinde, APP for the State.

CORAM: J.H.BHATIA, J.
DATE : 19th April, 2007.

ORAL ORDER:

1. Heard Mr.Gupte the learned senior counsel for the applicants and Mr.Jethmalani the learned senior counsel for the respondents. The learned counsel for both the parties have taken me through the record of the disputes extensively.

2. Admitted fact is that the respondent no.1 is the complainant and the applicants are accused nos.1 and 2 in the complaint filed by the respondent. It is also admitted fact that the applicant no.1 and the respondent no.1 were directors of the company called 'Prime Time Media Services Private Ltd.' wherein the respondent no.1

and his family members held 50% of the shares while the applicant no.1 and his family members also held 50% shares. On 25-8-1990 another company named 'Prime Time Video Communications Private Limited' was incorporated and the applicant no.1 and the respondent no.1 held the equal shares in that company also. These two companies may be referred as 'Prime Time Group'. The respondent no.1 complainant contended that the applicant no.1 represented to him that the business of the Prime Time was declining and the Prime Time could be wound up or the respondent no.1 could transfer his share holding in the company to the applicant no.1 and his family members. The applicant no.1 prepared a trial balance-sheet for the period from April, 1992 to October, 1992 showing net worth of the said company as Rs.9 lakhs. Believing the representation and the trial balance-sheet, the respondent no.1 sold shares of himself and his family members to the applicant no.1 for a sum of Rs.4,50,000/-. That payment was made. Later on, the respondent no.1 came across certain records and materials to show that the company was worth Rs.45 lakhs and the value was not correctly shown and thus, the applicant no.1 had cheated him. In view of this, he filed a complaint, which came to be registered as criminal case no.32 of 1995 under Sections 420, 120B of the I.P.C. The learned Metropolitan Magistrate directed

the police to investigate the case and accordingly the Assistant Inspector of Police submitted enquiry report dated 1st February, 1996. Relying on that report, the learned Magistrate passed the order dated 24-5-1996 and dismissed that complaint under Section 203 of Cr.P.C. It was noted by the concerned police officer and, relying on that report, by the learned Magistrate that as per the complainant, net worth of the Prime Time was Rs.45 lakhs but the documents, which he had produced were unauthenticated and, therefore, those documents could not be considered. After dismissal of that complaint, the respondent no.1 filed second complaint in September, 1996 on the same facts but alongwith the authenticated documents showing that the applicants had actually cheated him by representing that net worth was Rs.9 lakhs while infact, it was Rs.45 lakh. On the basis of that second complaint, process was issued on 19-1-1997 and the case was registered as criminal case no.34/S/1997 on 28th March, 2000. The applicants filed an application before the learned Magistrate seeking discharge from the case. The learned Magistrate rejected that application holding that it was necessary to record the evidence and it was also necessary to give full opportunity to the parties to lead the evidence and to find out the truth. That order was passed on 10th June, 2004. That order was challenged in criminal

revision application no.1210 of 2005. That revision application also came to be dismissed on 4-4-2006. Being aggrieved by dismissal of that revision application , the accused persons have filed the present application under Section 482 of the Cr.P.C.

3. The main contention of the applicants is that when the first complaint was already dismissed on merits after necessary enquiry, the second complaint based on the same facts is not tenable and is liable to be dismissed.

4. Mr.Gupte the learned senior counsel placed reliance upon **Pramatha Nath Talukdar v. Saroj Ranjan Sarkar AIR 1962 Supreme Court 876, Mahesh Chand v. B. Janardhan Reddy And Another (2003) 1 Supreme Court Cases 734 and Jatinder Singh and others v. Ranjit Kaur AIR 2001 SUPREME COURT 784** in support of his contention that the second complaint could not be entertained in the given circumstances particularly when the first was dismissed on merits. In Pramatha Nath, the Supreme Court observed as follows in paragraph 48:

> "48. .....An order of dismissal under S.203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but will be entertained only in exceptional circumstances,

> e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint enquired into....."

Their Lordships also quoted with approval the observations made by the Madras, High Court in **Doraisamy v. Subramania AIR 1918 Madras 484** wherein it was held that a fresh complaint can be entertained where there is manifest error, or manifest miscarriage of justice in the previous order or when the fresh evidence is forthcoming. In **Mahesh Chand v. B. Janardhan Reddy and Anr.,** the Supreme Court observed as follows in paragraph 19:

> 19. .....It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204 Cr.P.C. may take cognizance of an offence and issue process if there is sufficient ground for proceeding. As held in Pramatha Nath Talukdar case second complaint could be dismissed after a decision has been given against the complainant in previous matter upon a full consideration of his case. Further, second complaint on the same facts could be entertained only in exceptional circumstances, namely, where the previous order

> was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced....."

In **Jatinder Singh** also the Supreme Court reiterated the legal position laid down by the Supreme Court in **Pramatha N**ath Talukdar v. Saroj Ranjan Sarkar.

5. In view of the law laid down by the Supreme Court in these authorities, and particularly in Pramatha Nath, it is clear that an order of dismissal under Section 203 of the Cr.P.C. is no bar to the entertainment of a second complaint on the same facts but it may be entertained only in exceptional circumstances, for instance, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where there is manifest error or manifest miscarriage of justice in the previous order. This legal position will have to be borne in mind while looking to the facts of the present case.

6. The first complaint was dismissed by the learned Magistrate on the basis of the enquiry report

submitted by the police officer. It is material to note that unauthenticated balance-sheets were produced by the complainant/respondent no.1 to show that net worth of the Prime Time was Rs.45 lakh while the applicant no.1 had misrepresented the respondent no.1 earlier that the net worth of the company was Rs.9 lakhs only and thus, he had made him to dispose of his shares just for Rs.4,50,000/-. Enquiry report of the police officer clearly revealed that the applicant no.1 Rathnakar Rao had stated that the accounts of the Star Time for the year ending 1993 and all the documents were with him but he would produce all those documents before the Court whenever required because he apprehended that the complainant could misuse the said documents if provided to him or he could give it to some other agencies or the competitors of the Prime Time. It is material to note that infrastructure of the Prime Time was used by the Star Time in the newly established company of the applicant no.1 on paying 5% of the turnover of the Star Time as commission to the Prime Time. Therefore, to find out net worth of the Prime Time, it was necessary to see the accounts of the Star Time also. It appears that original record of the Prime Time as well as Star Time was in possession of the applicant no.1, which he refused to produce and surprisingly it appears that the police officer did not insist to produce that record.

Infact when unauthenticated balance-sheets were produced by the respondent no.1 before the police officer and the original record was in custody of the accused, it was the responsibility of the police officer to insist for the production of original record so that authencity or truth of the copy of the balance-sheet produced by the complainant could be ascertained. In spite of fact that original record was in possession of the applicant no.1/accused, police officer simply observed that the documents produced by the complainant pertaining to the Star Time and Prime Time were not authenticated and therefore, the said documents could not be believed at all. On the same ground, the learned Magistrate also dismissed the complaint.

7. It appears that after dismissal of the complaint only on the ground that the documents produced by the complainant were unauthenticated, he secured authenticated documents and filed second complaint in September, 1996. It can be said that the enquiry report submitted by the police officer was based on incomplete record because original record, which was in possession of the accused was not looked into by him and the record produced by the complainant was rejected by him merely because it was unauthenticated. In fact when the accused had refused to produce original record, adverse

inference could be drawn against him and the complainant could be given an opportunity to call the original record as per the procedure laid down in the Evidence Act when he would be called upon to lead the evidence in the matter. Dismissal of the complaint on the basis of the wrong approach amounts to manifest error or miscarriage of the justice in the previous order. Taking into consideration the circumstances, I find that the learned Magistrate was justified in issuing process in the second complaint and it is difficult to find fault in that order.

8. Mr.Jethmalani rightly pointed out that the process in the second complaint was issued on 19-1-1997 and that order was not challenged by the accused persons for about 3 years and for the first time on 20th March, 2000, the accused persons filed an application for discharge. He rightly pointed out that when the process has already been issued on a private complaint and that order is not set aside by any competent authority, order of discharge could be passed only under Section 245 of the Cr.P.C. Section 245 reads as follows:

> "245. When accused shall be discharged.--
>
> (1) If, upon taking all the evidence referred to in section 244 the Magistrate considers, for reasons to be recorded, that no case against

> the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
>
> (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

When the application for discharge was made and when the impugned orders were passed, admittedly evidence before charge was not yet led before the Court and, therefore, sub-section (1) would not be applicable. The case would fall only under sub-section (2), which provides that a Magistrate may discharge the accused at any previous stage that is the stage prior to the recording of the evidence, for the reasons to be recorded by such Magistrate if he considers charge to be groundless. Therefore, before recording of evidence under Section 244, the Magistrate may discharge the accused, only if the Magistrate considers the charge to be groundless and this could be on the basis of facts stated in the complaint itself; If the complaint itself would not make out case or if from the contents of the complaint it can be pointed out that the charge is groundless, then only the accused could be discharged under Section 245(2) even before the recording of the evidence under Section 244. If the complaint in the second case is looked into it is impossible to say that charge was

groundless therefore, the learned Magistrate observed that it was necessary to give full opportunity to the parties to lead the evidence before the order about framing of charge or order of discharge under Section 245(1) could be passed. I find no fault in this approach of the Courts below. Mr.Jethmalani pointed out that evidence before charge is already completed and the matter is fixed to hear the parties, whether on the basis of that evidence, recorded under Section 244, charge may or may not be framed.

9. Taking into consideration all the facts and the legal position, I find no fault in the impugned orders passed by the Courts below and I also do not see any justification to interfere by invoking inherent powers under Section 482 of the Cr.P.C.

10. In the result, application stands dismissed.

(J.H.BHATIA, J.)